Yong Songhua & Ors v Basic Venture International Ltd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-242–08 OF 2015
NOORIN BADARUDDIN JC
23 MARCH 2016

Civil Procedure — Jurisdiction — Forum non conveniens — Plaintiffs sued defendants under cause of actions in tort — Defendants applied to set aside plaintiffs' writ and statement of claim on ground of forum non conveniens — Whether Malaysia proper forum — Whether court had jurisdiction to hear plaintiffs' case — Courts of Judicature Act 1964 s 23(1) — Rules of Court 2012 O 12 r 10 & O 92 r 4

The plaintiffs had filed a writ and statement of claim ('the writ and statement of claim') against all the defendants for fraudulent misrepresentation, unjust enrichment, tort of deceit, breach of fiduciary duty, negligent misstatement and conspiracy to injure. In response, the second and third defendants ('the defendants') had filed the present application ('encl 34) under O 12 r 10 and/or O 92 r 4 of the Rules of Court 2012 and/or the inherent powers of the court to set aside the writ and statement of claim on the ground that Malaysia was not the proper forum to determine the matters herein. It was submitted by the defendants that the proper forum should be England or China as the first defendant was a company incorporated in United Kingdom and the plaintiffs were residing in China. In relation to this, the defendants also submitted that all of their witnesses were not the residence of Malaysia, hence, the present court was not the proper forum to try the case. On the grounds of *forum non conveniens*, the defendants contended that none of the alleged causes of action arose in Malaysia. Further, by virtue of cl 10.15 of the investment agreements ('the two agreements') entered into by the parties, they had irrevocably and unconditionally submitted to the exclusive jurisdiction of the courts of United Kingdom, hence, the court had the discretion to stay proceeding on the ground of breach of a jurisdiction clause. On the other hand, the plaintiffs submitted that by virtue of s 23(1) of the Courts of Judicature Act 1964 ('the Act'), any attempt to confine the plaintiffs to remedies in China or United Kingdom would be unjust. It was also submitted that China was not a signatory of the Reciprocal of Enforcement of Judgments Act 1958 ('the REFA'), hence China was not a proper forum. Further, only the two agreements had a choice of law clauses, which was the United Kingdom whilst the remainder of the plaintiffs' claim was based on representation made by the defendants with no corresponding agreements and choice of law clauses. In summary, the plaintiffs submitted that the defendants had failed to discharge the legal burden of proof

that China or United Kingdom was the more appropriate forum for the present suit.

Held, dismissing encl 34 with costs:

(1) It would be unjust for the plaintiff to be confined to remedies in China and the United Kingdom. From the pleaded facts, the subject matter of the dispute had nothing to do with the United Kingdom due to the fact that the first defendant was merely a shell company and had been dissolved as at 29 December 2015 after the present suit was filed. It would also be unjust to confine the plaintiffs to remedies in China as China was not a signatory of the REFA. The defendants being resident in Malaysia had an entrenched statutory right under s 23(1) of the Act to have the case against them heard in Malaysia. In addition, the residence of the plaintiffs and the witnesses was not a factor to be considered in regards to *forum non conveniens* (see paras 24, 27 & 30).

(2) With regards to the breach of jurisdiction clauses, the fact that the agreements were not signed in Malaysia would not cause the court to lose jurisdiction in this matter. As the plaintiffs' position was that, the entire investment scheme and the investment agreements were void, the choice of law provisions may not be binding. In totality, the defendants had failed to discharge the legal burden of proof that China or United Kingdom was clearly and distinctively more appropriate forum to hear the present suit (see paras 28 & 32).

[Bahasa Malaysia summary

Plaintif-plaintif telah memfailkan writ dan pernyataan tuntutan ('writ dan pernyataan tuntutan') terhadap kesemua defendan-defendan bagi salah nyata, pengkayaan tak adil, tort penipuan, kemungkiran tugas fidusiari, salah nyata cuai dan konspirasi untuk mencederakan. Dalam menjawab, defendan kedua dan ketiga ('defendan-defendan') telah memfailkan permohonan ini ('lampiran 34') di bawah A 12 k 10 dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012 dan/atau kuasa inherens mahkamah untuk mengenepikan writ dan pernyataan tuntutan atas alasan bahawa Malaysia bukan forum betul untuk menentukan perkara-perkara di sini. Adalah dihujahkan oleh defendan-defendan bahawa forum betul sepatutnya adalah England atau China kerana defendan pertama adalah syarikat yang ditubuhkan di United Kingdom dan plaintif-plaintif menetap di China. Sehubungan dengan ini, defendan-defendan juga berhujah bahawa kesemua saksi-saksi mereka bukan penduduk Malaysia, maka mahkamah ini bukan forum betul untuk membicarakan kes. Atas alasan *forum non conveniens*, defendan-defendan berhujah bahawa tidak satupun sebab-sebab tindakan yang didakwa tersebut berbangkit di Malaysia. Selanjutnya, mengikut klausa 10.15 perjanjian pelaburan ('kedua-dua perjanjian') dimasuki oleh pihak-pihak, mereka telah secara muktamad dan tanpa syarat tertakluk kepada bidang kuasa eksklusif

mahkamah-mahkamah United Kingdom, maka, mahkamah mempunyai budi bicara untuk menangguhkan prosiding atas alasan kemungkiran klausa bidang kuasa. Sebaliknya, plaintif-plaintif berhujah bahawa mengikut s 23(1) Akta Mahkamah Kehakiman 1964 ('Akta'), apa-apa percubaan untuk menghadkan plaintif-plaintif kepada remedi-remedi di China atau United Kingdom adalah tidak adil. Ia juga dihujahkan bahawa China bukan penandatangan terhadap Akta Penguatkuasaan Penghakiman Bersalingan 1958 ('APPB'), maka China bukan forum betul. Selanjutnya, hanya kedua-dua perjanjian mempunyai pilihan terhadap klausa-klausa undang-undang, yang mana adalah United Kingdom sementara baki tuntutan plaintif-plaintif adalah berdasarkan atas representasi yang dibuat oleh defendan-defendan tanpa perjanjian sejajar dan pilihan klausa-klausa undang-undang. Secara ringkas, plaintif-plaintif berhujah bahawa defendan-defendan telah gagal untuk melepaskan beban pembuktian undang-undang bahawa China atau United Kingdom adalah forum yang lebih wajar bagi tindakan ini.

Diputuskan, menolak lampiran 34 dengan kos:

(1) Akan menjadi tidak adil untuk plaintif dihadkan kepada remedi-remedi di China dan United Kingdom. Daripada fakta yang diplid, perkara pertikaian tidak kena mengena dengan United Kingdom akibat daripada fakta bahawa defendan pertama hanya syarikat tidak aktif dan telah dibubarkan pada 29 Disember 2015 selepas tindakan ini difailkan. Ia juga akan menjadi tidak adil untuk menghadkan plaintif-plaintif kepada remedi-remedi di China kerana China bukan penandatanganan APPB tersebut. Defendan-defendan sebagai penduduk di Malaysia mempunyai hak statutori yang berkanun di bawah s 23(1) Akta untuk kes terhadap mereka didengar di Malaysia. Selanjutnya, kediaman plaintif-plaintif dan saksi-saksi bukanlah faktor untuk dipertimbangkan berkaitan *forum non conveniens* (lihat perenggan 24, 27 & 30).

(2) Berhubung kepada klausa-klausa bidang kuasa, fakta bahawa perjanjian-perjanjian tidak ditandatangani di Malaysia tidak akan menyebabkan mahkamah untuk kehilangan bidang kuasa dalam perkara ini. Memandangkan kedudukan plaintif-plaintif adalah bahawa keseluruhan skim pelaburan dan perjanjian-perjanjian pelaburan adalah batal, pilihan peruntukan undang-undang mungkin tidak akan mengikat. Secara keseluruhan, defendan-defendan telah gagal untuk melepaskan beban pembuktian undang-undang bahawa China atau United Kingdom adalah jelas dan secara tersendiri forum yang lebih wajar untuk mendengar tindakan ini (lihat perenggan 28 & 32).]

Notes

For a case on *forum non conveniens*, see 2(3) *Mallal's Digest* (5th Ed, 2015) para 5770.

Cases referred to

American Express International Banking Corporation v Tan Loon Swan [1992] 1 MLJ 727; [1992] 1 CLJ 9; [1992] 1 CLJ Rep 1, SC (refd)

Harrah's Operating Co Inc (trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe Casion) v Wu Yun Shya Josephine and another appeal [2008] 4 MLJ 63, CA (consd)

Legislation referred to

Contracts Act 1950
Courts of Judicature Act 1964 s 23(1)
Reciprocal Enforcement of Judgments Act 1958
Rules of Court 2012 O 12 r 10, O 92 r 4

George Miranda (Rubachandran with him) (Miranda & Samuel) for the plaintiffs.

Ong Swee Long (Yap Zhen Jun with him) (Armiy Rais) for the second and third defendants.

Noorin Badaruddin JC:

[1] This is the second and third defendants ('the defendants') application under O 12 r 10 and/or O 92 r 4 Rules of Court 2012 ('the ROC') and/or the inherent powers of the court ('encl 34') for the following orders:

(a) that the writ and statement of claim filed by the plaintiffs dated 14 August 2015 be set aside;

(b) a declaration that this court is not seized with the jurisdiction over this suit on the ground that Malaysia is not the proper forum to determine the matters herein;

(c) stay of proceeding;

(d) cost of this application to be borne by the plaintiffs; and

(e) any other orders deem fit in favour of the second and third defendants.

[2] The defendants laid down 43 reasons in making this application and basically they are on the grounds of:

(a) *forum non conveniens;* and

(b) breach of jurisdiction clause.

BACKGROUND FACTS

[3] The plaintiffs being the citizen of the Republic of China had filed the writ and statement of claim pleading causes of action in tort against the

defendants, inter alia, for fraudulent misrepresentation, unjust enrichment, tort of deceit, breach of fiduciary duty, negligent misstatement and conspiracy to injure.

[4] The first defendant is a company incorporated under the laws of United Kingdom and information obtained from its website revealed that it is a multinational organisation which consists a group of investment specialist who monitor national and international stock, bond markets and the economic conditions surrounding all other markets. It further states that the first defendant also follow major international industries such as tourism, oil and gas, forestry, mining, banking and telecommunications by conducting detailed studies of different investment opportunities that a company or an individual may be interested in investing.

[5] It was also stated in the statement of claim by the plaintiffs that the website includes information that the first defendant has an address in Malaysia namely, Basic Venture International Ltd, 51–6A, Menara BHL, Jalan Sultan Ahmad Shah, 10050 Penang, Malaysia. It was also stated that the first defendant's cash receipt issued to the first plaintiff includes the said Malaysia address.

[6] The defendants are citizens of Malaysia with their residential addresses being in Muar, Johor and Melaka. The defendants are individuals involved in the business investment.

[7] The fourth defendant is a citizen of Malaysia having the address at 36, Jalan Radin 1, Taman Sri Endah, 67000 Kuala Lumpur, Wilayah Persekutuan, Malaysia. The fourth defendant was stated to be the sole director and shareholder in the first defendant.

THE DEFENDANTS' CONTENTIONS

[8] In relying on *Halsbury's Laws of Malaysia*, Vol 26, the defendants argued that this court is entitled to take into account all factors connected to the parties, the claim or the action including:

(a) the residence of the parties;

(b) the factual connections between the dispute and the court, such as the place where the relevant events occurred and the residence of the witnesses;

(c) the law which will be applied to resolve the dispute;

(d) the possibility of a *lis alibi pendens* or other related proceedings; and

(e) the question whether other persons may become parties to the litigation.

[9] On the grounds of *forum non conveniens*, the defendants contended that none of the alleged causes of action arose in Malaysia. The plaintiffs was said to have not pleaded in the statement of claim any causes of action that arose in Malaysia. It was submitted that the law of the country in which the events constituting the tort in question occurred (*lex loci delicti*) to be the law of England or China and etc and that Malaysia is not the natural forum. Hence, according to the defendants, it is more suitable for the matters to be tried at the natural forum of the alleged cause of action in tort ie England or China. Further, it was averred that all the plaintiffs are residing in China.

[10] The defendants further argued that the first defendant is a company incorporated under the laws of United Kingdom and having its registered address in England. The plaintiffs were said to have failed to prove that the principal place of business of the first defendant is in Malaysia. The defendants argued that the plaintiffs cannot rely on the first defendant's website to prove that the principal place of business of the first defendant is in Malaysia. Further, the nationality and residence of the fourth defendant is said to be unknown.

[11] The defendants listed 26 witnesses and averred that these witnesses are the officers of the first defendant who are material witnesses to give evidence during the trial and that all them are residence outside Malaysia and that this court is not the suitable forum to try the case. The defendants brought to the attention of this court during case management that the plaintiff had stated that they will be calling only three witnesses during the trial and that this suit is clearly an abuse of court process as the plaintiffs are not serious in this suit as there are 26 potential witnesses to be called during the trial to prove various causes of actions against the defendants. It was the defendants' contention that this suit is intended to extort money from them. Further, the documents which are material evidence such as bank-in slips, bank statements, official receipts and records of investment transactions are documents not available within the jurisdiction of this court.

[12] The defendants highlighted that cl 10.15 of the investment agreement stated that the respective rights and obligations of the parties shall be governed by the laws of United Kingdom, and each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of United Kingdom. Therefore, this court has the discretion to stay proceeding on the ground of breach of a jurisdiction clause.

THE PLAINTIFFS' REPLY

[13] The plaintiff on the other hand relied on the Court of Appeal case of *Harrah's Operating Co Inc (trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe Casion) v Wu Yun Shya Josephine and another appeal* [2008] 4 MLJ

63 which, inter alia, held that it would be unjust to confine the plaintiff/appellant to remedies elsewhere and that the respondent being a resident of Malaysia had entrenched statutory right under s 23(1) of the Courts of Judicature Act 1964 to have the case against the respondent heard in Malaysia. Section 23(1) of the Courts of Judicature Act 1964 states:

> 23 Civil Jurisdiction — general
>
> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
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> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) ...

[14] Therefore, the plaintiff submitted that any attempt to confine the plaintiffs in this suit to remedies in China or United Kingdom would be unjust.

[15] The plaintiff further contended that since China is not a signatory of the Reciprocal Enforcement of Judgments Act 1958 ('the REFA'), it should be the primary consideration in deciding that China is not the appropriate forum. The plaintiff further submitted that although United Kingdom is a signatory of the REFA, the subject matter of the dispute in this present suit has almost nothing to do with the United Kingdom as the first defendant is merely a shell company with one shareholder and director namely the fourth defendant. The first defendant has been dissolved as at 29 December 2015 after the present suit was filed. The plaintiff contended that the first defendant is incorporated to facilitate the scam against the plaintiffs.

[16] As to the clauses in the agreements, the plaintiffs' position is that there were two investment agreements in writing and that these two agreements are void or voidable. The plaintiff contended that the investment agreements are only relevant for investments totalling to GBP400,000 whereas the plaintiffs' full claim is approximately RM11,622,470 (GBP1,790,000). According to the plaintiffs, only these two agreements have a choice of law clauses, which is the United Kingdom. The remainder of the plaintiffs' claim is based on representation made by the defendants with no corresponding agreements and choice of law clauses.

[17] The plaintiffs further averred that the causes of action in the statement of claim is not limited to tort and includes the application of Contracts Act 1950 in that the investment scheme which the defendants sold is void or

voidable for misrepresentation. The plaintiffs contended that the causes of action in fact may have arisen in multiple jurisdictions. The plaintiffs in summary argued that the defendants have failed to discharge the legal burden of proof that China or United Kingdom is the more appropriate forum for this present suit.

[18] As to the list of witnesses, the plaintiff submitted that it is for the plaintiffs to secure relevant witnesses to prove their case. It was submitted that it is the plaintiffs' problem and is not a factor to be considered in regards to *forum non conveniens*.

FINDINGS OF THIS COURT

[19] At this juncture it is not for this court to go into the merit of the case. The consideration for this court at this stage is limited only to the issue of *forum non conveniens*. The plaintiffs will have to bear the burden of proving their claim and from the affidavit filed by the plaintiff in response to the defendants allegations, they are ready to adduce evidence to prove their case.

[20] In the plaintiffs affidavit it was averred that the defendants informed the plaintiffs of the existence of the first defendant as an investment company based in the United Kingdom. The defendants while promoting the investment scheme informed the plaintiffs that the defendants are the employees and/or agents of the first defendant. The plaintiffs then conducted a search on the first defendant through the website and two addresses in the 'Contact Us' section were revealed; one in the United Kingdom and one in Malaysia. After the plaintiffs invested the money into the scheme introduced by the defendants, they engaged their Malaysian solicitors to carry out a company search on the first defendant.

[21] It is apparent that the defendants are residents in Malaysia. Exhibit YS1 of the plaintiffs' affidavit in reply stated that the statutory documents from the search conducted with the Companies Commission in Malaysia on Toga Capital Sdn Bhd dated 25 May 2015 confirms that the defendants are residents of Malaysia. Exhibit YS2 of the plaintiffs' affidavit in reply confirms that from the companies house search report, it is stated that the fourth defendant is a resident in Malaysia as well. The plaintiffs discovered further that the first defendant's address in London was merely a 'PO box service' which was at Minshull House, 67, Wellington Road North, Stockport, Cheshire, United Kingdom, SK4 2 LP. It was also discovered that the first defendant was only incorporated on 22 May 2013 with a singular shareholder with one share and a director who is the fourth defendant.

[22] Further search done by the plaintiffs' solicitors revealed that the first defendant was then dissolved on 29 December 2015. It was the plaintiffs' averment that the information given by the defendants about the first defendant was false and designed to entrap the innocent investors such as the plaintiffs. It will be the plaintiffs' case that the defendants made an admission that they (the defendants) provided services to the first defendant to promote investment products and services of the first defendant and that it was the defendants who have to prove that they did not know the fourth defendant. The plaintiffs averred further that the officers of the first defendant listed on the website were fictional and will not be called as witnesses as they have nothing to do with the first defendant and the names were part of the fraud perpetrated by the defendants for the purpose of convincing individuals of the investment scheme.

[23] The plaintiffs stated further it is their case that the defendants are the masterminds of the investment scheme and they (the defendants) were instrumental in enticing the plaintiffs to invest. The defendants were said to be directors and shareholders of a new investment company in Malaysia namely Toga Capital Sdn Bhd which was alleged to have promote sophisticated and confusing investment scheme to unsuspecting investors.

[24] From the averments of the plaintiffs in their affidavit this court found that it will be unjust for the plaintiff to be confined to remedies in China and the United Kingdom. From the pleaded facts, the subject matter of the dispute has nothing to do with the United Kingdom due to the fact that the first defendant is merely a shell company and had been dissolved as at 29 December 2015 after the present suit was filed. From the affidavits filed by both parties, this case involves an investment scam where the full spectrum of activities in inviting individuals to invest was carried out in multiple jurisdictions including Malaysia. The question that will require determination will also involve the validity of any agreement entered between the parties in the present suit as the cause of action in the statement of claim is not limited to tort. It also includes the application of the Contracts Act 1950 as the plaintiffs are seeking a declaration that the investment scheme is void by uncertainty and/or voidable for fraud and/or voidable for misrepresentation. Based on the Court of Appeal decision in *Harrah*'s case, this court is of the considered view that the respondent being a resident in Malaysia had an entrenched statutory right under s 23(1) of the Courts of Judicature Act 1964 to have the case against them heard in Malaysia.

[25] In *Harrah*'s case, the plaintiff/appellant a duly licensed casino hotel had brought an action to recover loan granted to the defendant/respondent amounting to USD180,000 when she visited the casino. The appellant instituted the recovery action against the respondent, a Malaysian in Kota

Kinabalu, Sabah. The respondent proceeded with a stay action against the appellant on the grounds that the claim could be tried with less expense and inconvenience in Las Vegas, Nevada than Kota Kinabalu. The respondent contended that the parties had agreed at arms' length that only Nevada had the jurisdiction to resolve the matter. In support of her stance, the respondent relied on an ouster clause in the markers she was given by the appellant.

[26] Suriyadi Halim Omar JCA (as His Lordship then was) speaking on behalf of the Court of Appeal held at pp 64 and 72:

> (2) The respondent had failed to satisfy the court that some other forum was more suitable or appropriate. Moreover, the respondent being a resident of Malaysia had an entrenched statutory right under s 23 (1) of the Courts of Judicature Act 1964 to have the case against her heard in Malaysia.
>
> ... [20] As the appellant was entitled legally to commence its action in Malaysia, apart from the respondent having failed to satisfy the court that some other forum was more suitable or appropriate, it would be quite unjust to confine the appellant to remedies elsewhere. The source of the remark is the case of *American Express Bank Ltd v Mohamed Toufic Al-Ozier* [1995] 1 MLJ 160, where after discussing the above case of *Spiliada Maritime Corp v Consulax Ltd*, Peh Swee Chin FCJ had added:
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> > that in all cases of either a defendant's application for stay of proceedings...it will be obligatory for a Malaysian court to consider in any event, a most important factor, ie whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysian court considers all cases in connection with *forum conveniens*.

[27] Based on the same case, it is further found that it will be unjust to confine the plaintiffs to remedies in China as China is not a signatory of the REFA. In *Harrah*'s case the Court of Appeal found that since United States of America is not a signatory of the Reciprocal Enforcement of Judgments Act 1958, and as such a successful judgment there may not be easily enforced in Malaysia, the monumental problems and sufferings that will befall the appellant if the matters were to go through some fresh legal process all over again in Malaysia merely to enforce that judgment apart from being costly, would be plainly illogical and unjust. The same situation would also apply in this present case if the plaintiffs were to take the present action in China. From the facts, this court found that China or the United Kingdom for that matter could not be said to be clearly and distinctly more appropriate to be the forum than Malaysia.

[28] As to the breach of jurisdiction clauses, the perusal of the documents which will be alluded during the trial have yet to be established and again, it is the plaintiffs' burden. The plaintiffs argued that the remainder of their claim is based on representations made by the defendants whilst the choice of law clause only applies to the investment amount of GBP400,000 pursuant to the

investment agreements. It will be the plaintiffs who have to prove their argument on this matter and the defendants' argument otherwise should not stand in the way of their entrenched statutory rights promulgated under s 23(1) of the Courts of Judicature Act 1964 by virtue of them being a resident of Malaysia (*Harrah*'s case). The fact that the agreements were not signed in Malaysia will not cause this court to lose jurisdiction in this matter. As the plaintiffs' position is that, the entire investment scheme and the investment agreements are void, the choice of law provisions may not be binding. As stated by the Court of Appeal in *Harrah*'s case:

> ... It takes more than a hazy markers which formed part of a contract, to circumvent a statutory right emanating from the Federal Constitution to oust the Malaysian courts.

[29] The matters raise by the defendants justifying as to the forum not being Malaysia involves evidentiary burden on the plaintiffs proving their case. The plaintiffs' case will definitely involve the rules of admissibility in Malaysia. The evidence has yet to be established as admissible in law and the evidential burden will rest on the plaintiffs who are asserting the existence of a relevant factor. Further, this court agrees with the submission of the learned plaintiffs' counsel that this court may form an opinion upon points of foreign law if it arises. The plaintiff highlighted the case of *American Express International Banking Corporation v Tan Loon Swan* [1992] 1 MLJ 727 at p 732; [1992] 1 CLJ 9 at p 14; [1992] 1 CLJ Rep 1 at p 5 where the Supreme Court held:

> ... The defendant has clearly submitted to the jurisdiction of the courts in this country and in any case we see no reason why a court in this country where the defendant resides is not the forum conveniens and even if it is necessary for a court in this country to form an opinion upon a point of foreign law, s 45 of the Evidence Act 1950, can be applied.

[30] In regards to the residence of the plaintiffs and the witnesses, this court is of the considered view that these would be the plaintiffs' problem and it is not a factor to be considered in regards to forum non conveniens.

[31] There was an objection raised by the defendants on the grounds of delay on the part of the plaintiffs in filing the affidavit in reply which was left unexplained. It is admitted that there was more than two months delay. The defendants submitted that the plaintiffs' affidavit in reply should be expunged from the record due to the inordinate delay and the grave prejudice suffered by them. This court overruled the objection raised as it is of the considered view since the plaintiffs are residence outside Malaysia, the presence of the plaintiffs in this country for the purpose of preparing and attesting the affidavit in reply to the defendants' present application would have taken some time. Justice calls for the allowance of the extension of time even though no application was made by the solicitor for the plaintiffs for the said extension on record. After all,

the defendants had taken the liberty to reply to the affidavit in reply by the plaintiffs and the fact that the present suit has caused extreme stress and extra costs on the defendants are unacceptable to be grounds which has occasioned a substantial miscarriage of justice. No grave injustice has occurred on the defendants and objection on technical non-compliance should not be allowed when no substantial miscarriage has been occasioned.

CONCLUSION

[32] This court is satisfied that the defendants have failed to discharge the legal burden of proof that China or United Kingdom is clearly and distinctively more appropriate forum to hear this present suit. For the reasons stated above, this court dismissed the defendants' application in encl 34 with costs.

Enclosure 34 dismissed with costs.

Reported by Dzulqarnain Ab Fatar